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CURRENT TOPICS

The Legal Aid and Advice Act, 1949: The Law Society's Report

THE first report of The Law Society on the operation and finance of Pt. I of the Legal Aid and Advice Act, 1949 (together with the comments and recommendations of the Advisory Committee), which was published on 16th August (H.M. Stationery Office, 1s. 6d.), is replete with information and statistics which will be of the highest value in considering the future development and extension of the legal aid scheme. The number of solicitors who had joined the panels by 31st March, 1951, was 9,077 and the number of barristers was 1,643. In respect of the year ended 31st March, 1951, the Council of The Law Society submitted a financial estimate of the cost to the Exchequer amounting to £846,523 on the assumption that the reduced scheme would be brought into force on 1st July, 1950. Substantially less than 50 per cent. of the grant-in-aid was required prior to 31st March, 1951, having regard to the postponement till 2nd October, 1950, of the date of bringing the scheme into force and the inevitable time-lag between the date of issue of a civil aid certificate and payment out of the fund to meet the costs of the completed action. Since 1st September, 1949, the legal aid scheme cost some £365,000, of which £172,000 came from public funds and £193,000 from contributions, costs, damages and other moneys recovered on behalf of assisted persons. Only £5,137 was paid in respect of the charges of solicitors and counsel. The Advisory Committee were unable to draw any useful conclusion from the financial statement, because it was generally impossible to differentiate between expenditure incurred in planning and expenditure incurred in operation. 34,025 applications were received for certificates in the first six months of the scheme, 24,146 were considered, and 3,749 refused. It is suggested that some 4,500 applications may be expected every month. About 81 per cent. of the cases related to matrimonial causes; 2,576 related to King's Bench proceedings, of which 1,264 related to actions for damages for personal injuries.

Comment and Criticism by The Law Society

As yet, the Council of The Law Society comment on the working of the legal aid scheme, experience has been insufficient to enable any indication to be given of the significance of bad debts in respect of contributions, or of the position likely to arise by reason of cases being heard before the full number of instalments have become due for payment into the fund. The Council pay tribute to the poor man's lawyers in giving legal advice, but point to the absence of legal advice centres in many parts of the country, including large cities, and the impossibility of expecting a more comprehensive voluntary legal advice service, having regard to the extent to which solicitors and barristers are already contributing to the scheme. The additional burden on solicitors generally and on the Society's staff in assisting applicants to complete forms of application is inevitably slowing down the administration of the scheme and the Council's view is that the service will never be really effective until the provisions for legal advice

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are brought into operation. Section 5 of the Act, if brought into force, would go some way towards temporarily meeting the position, and it should be considered whether local committees should be enabled to grant certificates in cases of doubt limited in the first instance to obtaining counsel's opinion. The Council draw attention to the anomalies created by the lack of legal aid facilities in the County Palatine Courts of Lancaster and Durham and in the county courts with bankruptcy jurisdiction and draw attention to the Note for Guidance setting out the circumstances in which, in their view, it would be reasonable to refuse to grant to a proposed plaintiff a certificate for High Court proceedings which are within the jurisdiction of the county court. Summing up, the Council state their conclusion that on certain matters some amendments to the Scheme and Regulations are necessary, and add that arrangements for these amendments are already far advanced.

The Advisory Committee's Comments and Recommendations

THE Advisory Committee constituted under the Legal Aid and Advice Act comment on The Law Society's Report on the working of the scheme that high praise is due to The Law Society, their officials and the many solicitors and barristers who have undertaken committee work for the way in which the scheme has managed to deal successfully with a great volume of work while at the same time the legal aid officials and committees were learning their duties. From their investigations the committee are satisfied that the contributions of applicants are sometimes excessive, and refer to the steep rise in the cost of living since the Rushcliffe Committee's recommendation was made in 1945, which was adopted in s. 3 (1) of the Act. They do not consider that a free income of £3 a week any longer provides a correct criterion on which to base a contribution, and think that in due course the method of determining contributions will have to be revised, as the sacrifice now required is too high, especially in the case of married persons. But, the cost of widening the scheme, the committee feel, should have first claim on any additional public funds that might be made available in the near future. They also point to the hardship caused in some cases by the exclusion of actions for defamation and breach of promise from the scheme and the very considerable hardship to a large section of the public caused by the exclusion of county court proceedings from the scheme, especially if the recommendation of the Committee on Supreme Court Practice and Procedure that the jurisdiction of the county court in contract and tort be raised from £200 to £300 is adopted. The bad effect of excluding civil legal aid in courts of summary jurisdiction is also the subject of adverse comment, as well as the serious consequences of excluding legal advice and the disbandment of the Bentham Committee and the threatened closing of other legal advice centres. Reconciliation and the checking of headstrong litigation would be encouraged by the inclusion of legal advice in the scheme. On an estimate of the cost involved and the advantages which would accrue, including the " hidden asset " of weeding out bad cases, they urge the Government to allow The Law Society to set up the legal advice scheme as soon as possible.

The Central Land Board

THE Annual Report of the Central Land Board for the financial year 1950–51, which has recently been published, describes the progress made in the settlement of claims for depreciation of land values, the work carried out in the assessment of development charges and the Board's endeavours to encourage the sale of land at existing use value. At the end of the year the position with regard to claims against the £300m. fund was that, out of about 825,000 claims, the Valuation Office had given notice of their valuation in 387,968 cases and the Board had issued 197,214 formal determinations; of the latter 39 per cent. were in respect of land which in the Board's opinion had no development value, and 1 per cent. were in respect of claims too small to qualify. Two hundred and eighty-eight appeals were lodged, of which 90 were later withdrawn, against the determinations; no appeal had been heard. The Board say that the tendency has been for the smaller and simpler cases to be settled first. Payments towards professional fees for valuations on behalf of claimants amounted to £702,998. Twenty-nine thousand three hundred and forty-six claims have been made under the Planning Payments (War Damage) Scheme. Development charges imposed during the year resulted in the collection of £3,159,492 in cash and the set off of the further sum of £1,295,924 under the near-ripe schemes. By far the greatest number of charges related to dwelling-houses, which accounted for £1,418,976 of the amount paid in cash and the whole of the amount set off. Factories were second, accounting for £617,199 in cash. Of the set-off cases, 1,778 related to single plots, accounting for £358,103 or an average of about £201 per plot. It is interesting to note that only in 10 cases have the Board had to make an order under s. 74 of the 1947 Act, where development was carried out without complying with the development charge provisions of the Act; in none of these cases was a penalty imposed.

The Market in Land

MANY readers will be aware of the difficulties awaiting a client who wants to buy a piece of land on which to build a house or a factory or carry out some other development. Either suitable land is not in the market at all or, if it is, it is offered at a price well above existing use value and is, therefore, financially unattractive for a developer who will have to pay a development charge as well; as often as not such land as is available at a reasonable price is not land on which the planning authority is willing to allow the development. Not all these difficulties are due directly to the financial provisions of the 1947 Act; some are due to the stricter control of development and the strong policy which frowns upon ribbon development on classified roads, thus restricting development to infilling or to estates on which roads and services were laid down before the war, for few owners are willing to sink their capital at present in opening up new land. But the general result is to make land upon which development will be permitted unobtainable at the right price. It appears from the Central Land Board's Report that sales at existing use value are still more the exception than the rule; the Board's intervention on behalf of a prospective purchaser, however, not infrequently results in a sale by agreement at existing use value. Since they first used their powers of compulsory purchase the Board have made 25 compulsory purchase orders. The Board wish to draw particular attention to s. 73 of the Housing Act, 1936, which enables local housing authorities to acquire land at existing use value for resale to private developers. The Board understand that at least four authorities have recently decided to make land available in this way, and the Board co-operate with authorities who desire so to meet the needs of those to whom they have allotted, or hope to allot, building licences.

Procedure

IV—OF TACTICAL MATTERS

On more than one occasion a prospective defendant, whose advisers have remembered that the best weapon of defence is attack, has come to be recorded in the Law Reports as a plaintiff. The best known was probably that John Dyson who, anticipating that he might be sued for penalties in respect of his failure to complete a certain form of return for the purpose of the projected Land Values Duty, got his blow in first by suing the Attorney-General for a declaration that he was under no obligation to comply with the notices accompanying the form. Having fought successfully as far as the Court of Appeal ([1911] 1 K.B. 410) an application to strike out his statement of claim as showing no reasonable cause of action, the plaintiff repeated his success when the action came to trial; and, on appeal, not only did he sustain his victory but it was firmly established that an action for a declaration was, in the words of Fletcher-Moulton, L.J., "the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions" ([1912] 1 Ch. 158, at p. 168). In this respect, the Crown Proceedings Act, 1947, merely consolidated the position thus reached thirty-five years earlier. It did so by providing that civil proceedings by and against the Crown (as there defined) are to be governed by rules of court. These are the same rules of court as apply between subjects, and indeed the remedy of a declaratory order or judgment is often sought in actions between subjects, the words just quoted notwithstanding. The relevant order of the R.S.C. is Ord. 25, which we will proceed to consider as a whole, since it is concerned with tactical matters to an unusual degree.

Order 25 is headed "Proceedings in Lieu of Demurrer," and the two key rules are those numbered 2 and 4. These prescribe alternative methods under the present system of procedure by which the rigours of a full dress trial may be avoided in cases where one party takes the point that the pleadings of the other disclose no cause of action or proper ground of defence. The old procedure of demurrer asked the rhetorical but pertinent question "What then?", perhaps more forcefully expressed by the modern Americanism "So what!"

Nowadays if a defendant desires to take the point that, even assuming full and uncontradicted proof of all the facts pleaded by the plaintiff, they still do not spell out a cause of action entitling the plaintiff to the relief claimed, he may do one of two things. He may raise by his own pleading a point of law under Ord. 25, r. 2. Or he may apply to strike out the offending pleading under r. 4. The latter proceeding is comparatively familiar. Anyone served with a writ specially indorsed with a claim on an account stated arising out of a betting transaction should take this step straight away. Since *Law* v. *Dearnley* [1950] 1 K.B. 400 that has been recognised as a clear case, and it requires a clear case to render r. 4 appropriate. Arguable points should be raised under r. 2, and will be disposed of by the judge at or after the trial; or by consent or by order it is possible to set down a preliminary point to be decided before trial. There is provision in r. 3 for any consequential order dealing with the substance of the action if in the court's opinion the decision on the point of law disposes of the case.

As an instance of a reported case in which such an issue was dealt with as a preliminary point we may cite *Wilkinson* v. *Barking Corporation* [1948] K.B. 721. There the plaintiff's claim under the Local Government Superannuation Act, 1937, was successfully met by the contention that by the terms of s. 35 of that Act the jurisdiction of the court was supplanted by a special procedure for determining entitlement to superannuation. It was no doubt much less expensive to have this point decided as a preliminary issue than it would have been to prepare for a ceremonial trial with witnesses. On the other hand, a similar question of ouster of jurisdiction under s. 36 of the Gas Act, 1948, was debated in *O'Meara* v. *South Eastern Gas Board* [1951] 1 K.B. 307 on a summons to set aside the writ and all subsequent proceedings.

Yet a third possibility appropriate to cases where a point of law is the principal or only bone of contention is the preparation of a special case under Pt. I of Ord. 34. This expedient is reminiscent in some respects of the method of appeal from the decision of an inferior judicial tribunal by way of case stated. Here, however, there is no inferior tribunal, and usually the parties themselves concur in preparing a statement of the agreed facts (r. 1). There is also power for the court to direct the statement of the special case (r. 2) and in that event it may be necessary to have the draft settled by the master. A curious arrangement was come to at a late stage of the well-known bills of exchange case of *Jones* v. *Waring & Gillow, Ltd.* [1926] A.C. 670, in which counsel's opening address was adopted by both sides as an agreed statement coupled with the pleadings and the bundled correspondence (see [1925] 2 K.B., at p. 625). Lord Sumner more than once in his speech to the House of Lords refers to this situation and takes special care not to go beyond the agreed admissions. Following a decision on the point raised by a special case it is unnecessary, if the answer disposes of the whole issue, to proceed to trial. The court will make a declaration straight away (*Re Cane* (1890), 63 L.T. 746).

The last of the rules grouped together as Ord. 25 is r. 5, which says: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." The closing words are to be read quite literally, for, as was held by a majority of the Court of Appeal in *Guaranty Trust Co. of New York* v. *Hannay* [1915] 2 K.B. 536, not only is it immaterial that no consequential relief (e.g., damages or an injunction) is claimed in the proceeding, but the plaintiff need actually have no cause of action against the defendant.

That was indeed a case displaying to advantage the enterprise of the parties' advisers, and is, besides, a good illustration of the tangle into which the smooth course of an action can weave itself when both parties are minded to take technical points. The trust company had been holders of bills of exchange accepted by the defendants in respect of the price of certain cotton. The bills were paid by the defendants, but the cotton was not in fact delivered owing to the fraud of a third party. The defendants sued the trust company in America to recover the amounts paid. They succeeded in the circuit court, but the United States Court of Appeals ordered a new trial. It was admitted that English law governed the matter. At this point, while the new trial was still pending, the trust company (defendants in America) turned themselves into plaintiffs over here, and sought (*inter alia*) a declaration that they were not liable to repay the defendants.

A motion by the plaintiffs for interim injunctions was allowed to resolve itself into an application by the defendants

to strike out the paragraphs of the statement of claim which claimed declarations, and from the refusal of this application there was an appeal to the Court of Appeal. There the plaintiffs gained a victory as enlightening to posterity as it was barren as far as they themselves were concerned. There was, said the court, jurisdiction to make the declarations, and therefore no order to strike out was appropriate. On the other hand, the jurisdiction was discretionary, and would be exercised only in exceptional cases, of which, it was made clear, this was not one. Bankes, L.J., said that the action was "merely a request to the court to supply them (the plaintiffs) with evidence in a convenient form for use in the American action, and to supply it against the will of the appellants and possibly at their expense. In my opinion such a proceeding is not within Ord. 25, r. 5, at all."

We shall discuss other cases involving declaratory orders in the next article.

J. F. J.

A Conveyancer's Diary

THOMAS TILLING STOCK

BEFORE the Transport Act, 1947, came into operation, Thomas Tilling, Ltd., was the owner of large numbers of shares in omnibus companies and other road transport undertakings, which as a result of that Act were sold to the British Transport Commission. The consideration for this sale was £27,800,000, which was satisfied by the allotment to the company of British Transport 3 per cent. Guaranteed Stock, at the price of 101. The company thereupon resolved to turn itself into an investment and holding company, and at the same meeting also resolved to distribute £20,600,000 of the British Transport stock so received as a special capital profits dividend, in the proportion of £5 British Transport stock for every £1 ordinary stock of the company payable to the ordinary stockholders of the company on the register on the 21st February, 1949. The payment or allocation of this capital profits dividend has, inevitably, produced some knotty problems for trustees holding ordinary stock of the company on trust for persons in succession, and there have already been four applications to the court for the purpose of determining the question whether, in the particular circumstances of the case, the special dividend should be treated as income and paid over to the tenant for life, or as capital and retained for the benefit of the remaindermen.

The general rule in this respect is quite clear. It was stated by Lord Russell of Killowen in a series of propositions in *Hill* v. *Permanent Trustee Company of New South Wales* [1930] A.C. 720, at p. 730, of which the second is, for the present purpose, the most important: "A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus' or any other name, it still must remain a payment or division of profits." Lord Russell then went on to say that if the shareholder to whom moneys are so paid is a trustee, *prima facie* those moneys belong to the person beneficially entitled to the income of the trust estate.

This principle was applied in *Re Sechiari* (1950), 94 SOL. J. 194, which was a case of an application by trustees who held a sum of ordinary stock of the company on the 21st February, 1949, for directions whether the capital profits dividend paid thereon ought to be treated as capital or income. Romer, J., held that it should be treated as income, but on the request of counsel for the beneficiaries entitled in remainder he directed that the order should be made without prejudice to any question whether, in the circumstances in the administration of the trust, the court had or would exercise any jurisdiction to apportion the dividend on equitable principles between income and capital.

There is no report of any further application to the court in this case, but in *Re Kleinwort's Settlement Trusts*, *ante*, p. 415, another set of trustees applied for directions in regard to a sum of Transport stock received by them as a special capital profits dividend on Tilling stock, and in addition to asking the usual question whether the Transport stock should be distributed as income or treated as capital, they invoked the jurisdiction of the court to apportion the stock, according to the suggestion incorporated in the order in *Re Sechiari*, *supra*. Vaisey, J., answered the substantive question in the same way as Romer, J., had done in the earlier case, and the decision is of interest only in regard to the suggested apportionment.

As to this part of the case, the learned judge expressed doubts whether the jurisdiction to apportion did not depend on and arise out of the power of the court to remedy a breach of trust; and by way of example he suggested that if the trustees had acquired the Tilling stock on the eve of that company's resolution to distribute the special capital profits dividend, at the instigation of a life-tenant, or with the express object of benefiting a life-tenant, or for some other ulterior motive, the court might well consider that an apportionment should be made. But that was not the case in the circumstances before the court, and the disparity between the amount of the original Tilling stock and the amount of the Transport stock, which was the chief point made by the remaindermen in support of their request for an equitable apportionment of the Transport stock between capital and income, although it seemed very striking to the learned judge, did not of itself, in his judgment, justify the court's interference. The request to apportion was, therefore, refused.

The view that the jurisdiction to apportion between capital and income is confined to cases of breach of trust also commended itself to Harman, J., in *Re Maclaren's Settlement* [1951] W.N. 394, which was, however, a decision on very special facts. A fund was held by trustees on trust either to retain in its existing state of investment or to sell, and with the consent of the tenant for life to invest the proceeds in manner authorised by the settlement. Late in 1948 the trustees had a sum of money in hand due to be invested, and they recommended to the tenant for life that part of this sum should be laid out in the purchase of Thomas Tilling ordinary stock. It had then been announced by the chairman of Thomas Tilling, Ltd., that he proposed to ask the company to sanction the distribution of part of the British Transport stock which had then recently been agreed to be paid to the company in consideration of the sale of its transport interests to the British Transport Commission in the manner in which it was eventually distributed, and the trustees recommended the purchase of this stock, and the tenant for life gave his consent thereto, because they all considered the purchase to

be a good speculation. In fact, both the Thomas Tilling ordinary stock and the British Transport stock distributed as a special capital profits dividend on the former were later in 1949 sold with the consent of the tenant for life at a capital loss.

The evidence showed that both the trustees and the tenant for life regarded the purchase of the Thomas Tilling ordinary stock as a capital investment, and when this stock and the British Transport stock were sold by the trustees the proceeds of sale were used in the purchase of a house for the tenant for life to live in. On the application of the tenant for life for a charge on the property representing the proceeds of sale of the British Transport stock based, apparently, on an invocation of the court's jurisdiction to apportion, Harman, J., held that the tenant for life was not entitled to a charge on the property in question. The ground of this decision was that the purchase of the stock had throughout been a capital transaction, and that the tenant for life, by consenting to it on that footing, had no equity to have the transaction reopened subsequently and treated on any other footing.

But the broader question of the court's jurisdiction to apportion sums between capital and income was also considered in this case, and after examining a number of authorities the learned judge expressed the view that such a jurisdiction undoubtedly existed, but could be exercised in special circumstances only, e.g., where to treat a sum as capital would produce a glaring injustice to a tenant for life, or vice versa. No very steady light is shed on this jurisdiction by any of the recent decisions on Thomas Tilling stock, and it is not entirely clear whether the jurisdiction is confined to administration proceedings or is equally available in the execution of trusts. Another instance of the exercise of this jurisdiction is to be found in *Re Hotchkys* (1886), 32 Ch. D. 408, a decision usually cited in connection with the apportionment of the costs of repairs to trust property.

The last of the recent cases on Thomas Tilling stock, *Re Winder's Will Trusts*, *ante*, p. 467, differed from all the others in that the question there raised related purely to the administration of an estate, and not to the execution of a trust, and from its two immediate predecessors in that no question of the apportionment under any equitable jurisdiction was raised. A testator who died on the 27th February, 1949, owned a sum of Thomas Tilling ordinary stock. By his will he directed that the residue of his estate should be retained in its existing state of investment and the income thereof paid to the tenant for life. On the 21st February, 1949, notices convening a meeting of the company on the 17th March were sent to all stockholders, including the testator, with a copy of the resolution it was proposed to put to the meeting. This resolution provided for the distribution of the special capital profits dividend to be payable to the stockholders on the register of the company on the 21st February. In these circumstances Romer, J., held that as the distribution had been made payable in respect of a date in the testator's lifetime, although it was not actually paid until after his death, what was received by way of the special capital profits dividend should be regarded as income which had accrued due before the death and was, therefore, capital.

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Landlord and Tenant Notebook

AGRICULTURAL HOLDINGS—ADEQUACY OF NOTICES

THE point decided in *Budge* v. *Hicks* (1951), 95 SOL. J. 501 (C.A.), was a short one; but the decision is one which may, I would suggest, have implications.

Under the Agricultural Holdings Act, 1948, it may be said that the grantee tenant of a farm virtually has a tenancy for life as long as he produces all the food he can be expected to produce. Section 24 (1) of the Act entitles him to challenge a notice to quit given without the consent of the Minister of Agriculture and Fisheries, nullifying it unless and until the landlord obtains the required consent; but subs. (2) excludes notices to quit given in a number of sets of circumstances, seven in all. Among them are: "(*d*) at the date of the giving of the notice the tenant had failed to comply with a notice in writing . . . to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid" and "(*e*) at the date of the giving of the notice to quit the interest of the landlord in the agricultural holding to which the notice relates had been materially prejudiced by the commission by the tenant of a breach, which was not capable of being remedied, of any term or condition of the tenancy which was not inconsistent with the fulfilment, etc., and it is stated in the notice, etc."

The plaintiff in *Budge* v. *Hicks* was the landlord of a holding who had served the defendant, his tenant, with a notice to quit which gave as reason: "You have broken the terms of your lease by cutting timber reserved in the lease, wilful damage and neglect of my property and . . . farming the land . . . contrary to the rules of good husbandry." The tenant presumably gave a counter-notice, and did not require questions arising out of the reason stated in the notice to quit to be referred to arbitration under the Agriculture (Control of Notices to Quit) Regulations, 1948, reg. **4**; and, when sued for possession after expiration of the notice, he pleaded its alleged ambiguity. The county court judge held that it was a valid notice under para. (*e*). The Court of Appeal disagreed.

It may be that the county court judge had reasoned that as no "notice to remedy within a reasonable time" had been served, and the complaints were serious, the tenant could or should have had no doubt in his mind that the plaintiff relied on para. (*e*); but the Court of Appeal considered that the document was not adequate for any such purpose, as the recipient was not told by which route his landlord sought to evict him. Denning, L.J., in his judgment advised landlords of agricultural holdings who wished to give tenants notice to quit to obtain legal advice because of the many legal requirements to be fulfilled before the notice was valid.

The advice thus tendered prompts the thought that whenever a statute is passed modifying some rule of common law for the benefit of a section of the community (other than lawyers) we are apt to be told, on the one hand, that as common-law rights are being cut down strict interpretation is called for, and on the other hand that the objects of the Legislature must not be frustrated by resort to technicalities. In the case of the Increase of Rent, etc., Restrictions Acts, the latter principle may be said to have underlain the judgment delivered by Scott, L.J., in *Epps* v. *Rothnie* [1945] K.B. 562 (C.A.), when he interpreted the "become landlord

by purchase" exception in the "reasonably required" ground for possession (Rent, etc., Restrictions (Amendment) Act, 1933, Sched. I (*h*)) as designed "to protect a sitting tenant from having his house bought over his head"; and that of Morton, L.J., in *Baker* v. *Lewis* [1947] K.B. 186 (C.A.), dealing with the same provision: "I am well aware that the word 'purchaser' and the words 'by purchase' have in certain contexts a technical meaning which is well known to all lawyers, but I am not aware of any case in which the words 'by purchasing a dwelling-house' have been given any technical meaning." The draftmanship of those Acts has, however, been subjected to so much judicial criticism that it might be better to seek an example nearer in nature to the matter in hand, and *Jones* v. *Evans* [1923] 1 K.B. 12 (C.A.) illustrates the point.

For in that case the ex-tenant of an agricultural holding (within the then Agriculture Act, 1920) objected to the alleged insufficiency of particulars of a claim for dilapidations (such particulars being necessary whether compensation was claimed by landlord or by tenant), given under thirteen heads; his counsel instanced that a complaint of failure to keep the farm-house in repair did not say where the disrepair was, that the same applied to an allegation about the fences, that "failure to cultivate the said farm and lands in a good husbandlike manner according to the custom of the country" gave no particulars at all; but in the course of his judgment rejecting the argument, Bankes, L.J. (with whom Warrington, L.J., agreed), said: "I think it must have been within the contemplation of the Legislature that the kinds of dispute to which the section relates would in many cases arise between men who did not engage legal advisers, but who employed to assist them tenant farmers, agents, or valuers—persons who were very competent to deal with cases of this description, though not trained to draft formal legal documents." It is worth mentioning, however, that Atkin, L.J., dissented, observing that he would have thought that in the majority of cases both landlords and tenants were advised upon the particulars of their claims by the professional valuers who would later on adjust their differences, or by solicitors; and he considered that a course should be steered between the two extremes of putting a narrow meaning upon the Act and giving it a nebulous meaning. And it is of interest that the 1948 Act has provided that, as regards the actual notification of a claim, it shall be a sufficient specification if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made.

These considerations—the refusal to discriminate between landlord and tenant, and the sanctioning of references to the Act as a means of conveying information—suggest how the county court judge in *Budge* v. *Hicks* may have reached the conclusion he did; but the fact remains that the landlord in that case did not as much as specify "s. 24 (2) (*e*)" and did not even use the words "interest materially prejudiced" or "breach not capable of being remedied." It is true that what he did say suggests that he was complaining of such breaches, but the expression (which used to be found in a provision disentitling the tenant to compensation for disturbance: the Agricultural Holdings Act, 1923, s. 12 (1) (*c*)) has been severely criticised by Mr. Aggs, an authority on agriculture as well as on law, because any breach—and he instances the felling of timber, mentioned in the recent case—can be remedied by money or time, or both; constructively, he suggests that what is meant is a breach which could not be remedied within the currency of a twelve months' notice to quit.

I mentioned, earlier in this article, the provision in the Control of Notices to Quit Regulations by which a tenant can require any question arising out of the reason stated in a notice to quit to be determined by arbitration. A branch of the Farmers' Union has recently complained that this does not go far enough, no arbitration being possible till notice to quit has been served, and wants the Act amended so as to give a right to determine the correctness or otherwise of a landlord's allegation when it is first made. But, unless a pre-notice consent is sought under s. 24 (2) (*a*)—in which case the tenant will be given a hearing (s. 25 (2))—there is nothing to compel a landlord to make any allegation of breach (and s. 57 (3), virtually postponing his remedies till the end of the tenancy, rather encourages reticence) until he gives notice to quit, so something rather more drastic will be necessary if the complaint is to be met.

R. B.

PRACTICAL CONVEYANCING—XXXVII: NEW STREETS

Cost of Street Works

THE observation has been made previously in these notes that modern statutes contain many provisions which must be taken into account by solicitors engaged in conveyancing practice although the necessity for doing so is not immediately apparent. A further example occurs in the New Streets Act, 1951, which will come into force on 1st October next. A summary of the law relating to the liability for the making up and repair of highways is contained *ante*, at p. 507, and the 1951 Act is mentioned. The effect on conveyancing practice is such that some further comments may be useful.

The main rule made by the Act is that no work may be done in erecting a building for which plans are required to be deposited in accordance with building byelaws if the building will have a frontage on a private street unless the owner of the land, or a previous owner, has paid to the local authority or secured to their satisfaction a sum in respect of the cost of street works. First, we must note that the local building byelaws provide the test of the buildings concerned; most building byelaws are in common form and require plans to be deposited for almost all buildings except very small ones for such purposes as poultry houses, greenhouses and cycle sheds. Secondly, the Act does not apply in metropolitan boroughs and it does not apply in rural districts unless the Minister of Local Government and Planning orders that it shall. Thirdly, the word "owner" is defined as having the meaning given to it by the Public Health Act, 1936, i.e., "the person for the time being receiving the rack rent of the premises . . . whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rack rent." If the premises are let on a long lease at a nominal rent, the lessee will be the "owner." The definition may be convenient for public health purposes, but it may introduce some difficulties into the operation of the New Streets Act, particularly where an agent receives the rent. Finally, the Act does not apply to land fronting on to a highway repairable by the public. If it fronts on to a private street which is already paved, presumably no payment or security will be required or a very small one will be required on account of works needed to bring the street up to the standard required by the local authority for adoption as a highway repairable by the public.

If work is done without deposit or security the owner of the land and any person undertaking the erection of the building is liable to a fine of £100. Where the person undertaking the erection of the building is not the owner it is a

defence for him to prove that he has reasonable grounds for believing that the sum had been paid or secured by the owner. It seems very unfair that an owner is liable to a penalty if he has let the land at a rack rent to a tenant who commences building without notice to the owner. Presumably no penalty would be imposed on the owner in such a case if he did all he could to stop the building work when he heard of it.

Exemptions

The requirement of deposit or security for costs of street works does arise in a number of cases which are difficult to summarise. For obvious reasons the requirement does not apply where there is an exemption from liability in the appropriate private street works code (in the absence of local legislation this code refers to the Private Street Works Act, 1892, or the Public Health Act, 1875, s. 150, whichever is used in the particular area). It does not apply if the new building is in the curtilage of and appurtenant to an existing building, or where the plans were deposited before 1st October, 1951 (this may give reason for some speedy action if the operation of the Act would be inconvenient). The local authority may exempt the building if satisfied that the street is not likely to be sufficiently built up within a reasonable time to justify the carrying out of street works or that it is not likely to be joined within a reasonable time to a highway repairable by the public. These exemptions are apparently intended to prevent a burdensome application of the Act to isolated development. Similarly, the building is automatically exempted if (*a*) the street is less than 100 yards in length and is at least 50 per cent. built up on 1st October, 1951, or (*b*) it is more than 100 yards in length and the site can be included in any length of the street which is not less than 100 yards in length and is on 1st October, 1951, at least 50 per cent. built up. The local authority may exempt a building where these conditions are not precisely complied with if satisfied that on 1st October, 1951, the street is substantially built up.

Amount and Effect of Payment

The amount required to be paid or secured must be fixed by the local authority within one month after the plans of the building are deposited. It is to be such sum as, in the opinion of the local authority, would be recoverable under the appropriate private street works code in respect of the frontage of the proposed building on the private street if it were *then* made up to the standard necessary for it to be declared a highway repairable by the public. There is a provision whereby the local authority may substitute a *smaller* sum for that first fixed. Therefore, the authority may not increase the sum first fixed, but as they may reduce it representations can be made to them giving reasons why their first suggestion is too high. Alternatively, the owner may appeal against the amount fixed to the Minister of Local Government and Planning, but he must do this within one month after the authority gave notice of their assessment.

The Act does not say what form security may take beyond the provision that it must be "to the satisfaction of the authority." It is clear that it may be a mortgage because the Act provides that such a mortgage shall not be deemed to be a prior mortgage for the purposes of the Building Societies Act, 1894, s. 13 (this is the section which prohibits advances by building societies on second mortgage). Modern building methods are tending towards the construction of roads before building work commences, partly in order to facilitate access to the site for lorries and machinery. Consequently the cost of completing the roads from the state they are in immediately before building commences may often be small. The giving of satisfactory security may be somewhat troublesome and so one is inclined to suggest that often a payment to the local authority will be found to be advisable. On the other hand, if the builder proposes to carry out all the street works himself in a comparatively short time it may be convenient to provide security only. If this is done and he sells houses before the street works are completed the security will merely remain and be discharged when he has completed the works. This will be more convenient than arranging for the builder to make a payment to the local authority which would be repayable to the various purchasers of houses and not to the builder if the street works were not completed until after houses had been sold. Where a payment is made to the authority they must, in their accounts, add to it interest at the rate of 3 per cent. (apparently less tax at the standard rate) and so there is no loss in making an immediate payment.

Where a payment has been made, or security provided, the liability of the owner for the time being of the land in respect of the carrying out of street works is deemed to be discharged *to the extent of the sum paid or secured only*. It is most important to appreciate the significance of this limit; if the authority underestimate the cost, or if costs rise before the work is carried out, the owner at the time when the work is done will have to pay the balance under the normal private street works code. On the other hand, if the street is not made up by the local authority (for instance, if it is made up by the builder) any sum deposited must be refunded to the owner for the time being. In such a case, if security was provided by the person who is for the time being owner, it must be released; if it was provided by someone else (e.g., a former owner who carried out the development) the authority must realise the security and repay the owner for the time being. Where the street is made up by the local authority and the sum paid or secured exceeds the cost of the works, the excess must similarly be paid to the owner for the time being. If it should happen that the proposal to build is abandoned after payment on account of street charges the repayment must also be made to the owner for the time being.

Implications on Conveyancing

The two essential points to bear in mind are, first, that payment or security may not completely discharge a future liability for street works and, secondly, that any repayment by the local authority of the whole or part of the sum deposited with them will be to the *owner for the time being*. Therefore, if building land is sold after payment has been made or security given the price should be increased on account of the value to the purchaser of the payment or security (just as a higher price would be paid if an adjoining street had been made up). Similarly, if an owner who has made a payment or given security erects on the land and sells houses the purchaser of each house may safely pay a price based on the assumption that any future liability for street charges will be largely, if not entirely, discharged. Sums paid or secured are regarded as being apportioned between purchasers of plots in proportion to their respective frontages.

Building licences for houses are usually given on terms that all street works are carried out by the builder and the maximum price specified in the licence is fixed on this assumption. If the street works have not been carried out to the standard required by the local authority a purchaser should contract to purchase on terms that they will be so carried out; if the work has not been finished by completion date the conveyance should contain a covenant in similar terms.

A failure by the builder to make a payment or give security under the 1951 Act would not be a defect in title, but an inquiry should be made whether he has done so, and (if appropriate) what is the value apportioned to the frontage being purchased. To the extent of such value the purchaser will be protected against any further demand by the local authority on account of street charges. There will be no need to mention in contracts or conveyances the fact that a payment has been made or security given under the New Streets Act. The terms of the Act are such that the payment or security operates for the benefit of the purchaser even if he does not know about it.

MISCELLANEOUS

A difficulty in the past has been that frontagers could not compel the local authority to take steps for the making up of a private street. Provided that at least one frontager has made a payment or given security under the 1951 Act a majority may require the local authority to have the road made up and then to declare it a highway repairable by the public. Unfortunately, for some time this power will be limited as the local authority are not bound to act unless they can get ministerial consent under Defence Regulations to the carrying out of the work (which consent is now given only for a limited amount of work in each area in any year).

One cannot emphasise too much the value to a frontager of having street works carried out and the street declared a highway repairable by the public. Until these steps are taken the liability for repairs remains on the owner however much the public may use the street. The New Streets Act, 1951, may be troublesome to builders and in some respects its provisions are unsatisfactory. There is much to be said for making the payment or security a complete discharge of any future liability for street works, but local authorities were very concerned about the liability this would have left on them in a time of rising costs. The Act should at least avoid the hardship which has occasionally occurred in the past where builders have represented that there would be no street charges against purchasers, but have failed to make the streets to the satisfaction of the local authority, with the result that charges have later been imposed on unsuspecting purchasers.

J. G. S.

HERE AND THERE

SPLIT PERSONALITIES

IN earlier and simpler times, before the psychologists and the psychiatrists started scrabbling about in the recesses of our problematical sub-consciousness, a neat one-piece personality woven throughout without split or fission was commonly regarded as a perfectly adequate issue for every ordinary citizen. Anti-social characters there might be of the Jekyll-Hyde school, werewolves, hybrids part fish, part flesh, part fowl, but no one really wanted to be classed with them. The whole ponderous mass of proverbial wisdom stood embattled on the side of single minds with single purposes, ever ready to pin the cobbler to his last and Jack to his one and only trade. (Where is thy leather apron and thy rule?) But we have changed all that, and frustrations, complexes, neuroses, repressions and split personalities currently rank as a high priority in the birthright of the common man and woman. They help the conversation. They enable the psychiatrists to contribute their share of sur-tax to the national necessities. They provide jolly games for candidates for responsible employment in the civil or the military services. They enable the lawyers to make some show of defending the indefensible, to explain the obscure (or even the not very obscure) by the more obscure, a bicycle theft by, say, psycho-neurosis, that admirable discovery of which the Lord Chief Justice recently observed that the expression was one "with which the court is very familiar, but never quite knows what it means." After all, as Mr. Paul Bennett said at Marlborough Street lately (quoting an eminent medical authority), everybody is abnormal and there is no such thing as a normal person, a doctrine which, once it comes to be generally accepted, should play ducks and drakes with a jurisprudence based on that now outmoded character the ordinary reasonable man and his near relative, the free and lawful man, whose health, indeed, is causing so much concern in reflective circles these days.

TWO LAWYERS IN ONE

EVEN the lawyers who, of all men, one would expect to be all of a piece and in no wise at odds with themselves, not given to opening casements on perilous seas in faery lands forlorn, seem now as liable as anyone else to be of two minds and that not in the sense of the old gibe of duplicity. It is somewhat significant that the two best (I mean most readable) books by legal authors published in the last half-dozen years (by solicitors incidentally) have owed the greatest part of their charm to this mental duality, ten thousand miles away from the monolithic solidity of traditional legal reminiscence and anecdote. I mean the Confessions of an Uncommon Attorney, by the late Reginald Hine, and This Ever Diverse Pair, by G. A. L. Burgeon. In the former it was implicit, in the latter explicit, since its whole story is of the strains and stresses of a legal partnership, never to be dissolved by any process known to the Partnership Act, in which the plodding, laborious, formal, calculating, strictly professional Burden is engaged in a never-ending tug-o'-war with the fanciful, contemplative, humorous partner with whom he shares not only table, telephone and office, but the skin and skeleton of the body they both inhabit.

LAWYER AND BARD

As a matter of fact, when you consider the diversity of human beings and of their potentialities it is the single-purpose man—rationalised, directed, functional—who looks something of a monstrosity. The more a lawyer knows about life the more use he is to his client, even in the narrowest utilitarian sense. Swallowing Mews' Digest (admirable, no doubt, as a *tour de force*) is not quite good enough. It was nice, for instance, to hear, as we did the other day, that at the National Eisteddfod of Wales a Glamorgan solicitor, robed in purple and silver, was acclaimed a Chaired Bard for "an outstanding ode." There was more than a touch of The Napoleon of Notting Hill in the picture. The ode incidentally he had entered, with something of an excess of diffidence, "purely for criticism," but the fulfilment of the Christian precept in "Friend, go up higher" has made him a Maestersinger. (The curious, by the way, visiting the Middle Temple Library, will find the Librarian occupying a ponderously carved bardic chair, though they will in vain hope to hear him raise his voice in chant, for the award was to one of his predecessors.) Quite apart from the reassuring reflection that here was a change from the man of law whose single alternative to the office was walking the golf course, I should certainly regard a bardic qualification as something of a recommendation in the handling of my affairs, even though the effluxion of time may have somewhat diminished the ancient capacity as practised, we believe, by bards of an earlier generation to call spirits from the vasty deep and effective curses on to the heads of their opponents. If some eccentric despot were to offer me the chance of saving my life by drafting an ode or drawing a conveyance I should unhesitatingly choose the latter as being the easier by a long chalk; in a person so versatile as to be able to do both I think I should repose unlimited confidence.

RICHARD ROE.

Mr. A. H. McBean, solicitor, of Tettenhall, Staffordshire, left £63,907.

Mr. W. J. B. Blew, retired solicitor, of Esher, left £16,650 (£16,486 net).

Mr. R. C. Bolton, solicitor, of Alton and Farnham, left £18,208.

Mr. William Glasgow, solicitor, of Liverpool, left £61,323.

Mr. A. G. Hubbard, solicitor, of Ross-on-Wye, formerly solicitor to the Great Western Railway Company, left £37,227 (£36,857 net).

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Infants' Settlements

Sir,—Referring to the article under the above heading in your issue of 4th August, 1951, your readers will be interested to know that in the Appendix to the 93rd Report of the Commissioners of Inland Revenue for the year ending 31st March, 1950, it is stated that sums which have been accumulated under such settlements as are mentioned in s. 21 (3) of the Finance Act of 1936, contingently on a child attaining the age of twenty-one years or marrying, and which are handed to the child on the happening of either contingency, are not treated as caught by the subsection. This means presumably that they are treated as income of the child and not of the settlor.

London, E.C.4. JANSON, COBB, PEARSON & CO.

Reform of the Law

[See p. 487, *ante*.]

Sir,—It is not only when the court has discretion that counsel is unable to say what the law is. As most practising solicitors know to their sorrow, they are unable to give very definite advice in many other cases, and their inability is because of the uncertainty of the law.

Of course private litigants have to bear the cost of litigation, but unnecessary litigation is caused by having to ascertain what the law is. To establish it parties may even have to pay the cost of an appeal to the House of Lords. I do not say that codification would abolish all litigation on legal points, but it should reduce it, particularly if there was proper Parliamentary machinery for simply, quickly and clearly amending the code.

The quotation of authorities does not really help the argument. I, of course, respect Sir William Holdsworth as a legal historian, but his views on law reform are not worth a great deal. I could, in reply, cite Bentham on the advantages of codification.

The issue is a simple one. Should the law be set out as clearly as possible and should it be accessible to all citizens? Codification would provide this, although it would not remove the necessity for legal advice on the effect of the codified law. The parts of English law which have been codified, such as the sale of goods, are generally conceded to have been a success, and successful experiments have also been made in other lands where English law has been received. Codification would also have another advantage. It would encourage other countries to adopt the principles of English law and, critical though I am of our law, I have a high enough opinion of it to wish to see it spread as widely as possible.

R. S. W. POLLARD.

London, S.W.1.

Illegible Signatures

Sir,—I write in defence of those who, like myself, use what Vaisey, J., and you chose to castigate [95 SOL. J. 474] as illegible signatures. Please be more accurate.

What appears at the foot of our letters and on affidavits and documents signed by us as deponents, commissioners for oaths, witnesses or what you will does not purport to be a representation of our individual initials (first or second names) and surnames. It is a sign manual indicating that it is the authentic work of the one of us concerned. If something entirely legible were appended without more that would be an indication that it was spurious.

I will agree that where there is no other indication of authorship and the correspondent receiving or other person handling the document is unlikely to know whose sign manual it is, we ought to add our names in a legible form. But that would not be a translation of the sign manual.

Occasionally it happens that the solicitor or clerk who brings the document says he will add the name in type or other legible means and forgets to do so. Are we to be blamed for this?

London, E.C.4. MAX C. BATTEN.

[Our correspondent's identity was revealed by his note-heading. —ED.]

NOTES OF CASES

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

CONTRIBUTORY NEGLIGENCE: DUTY OF PLAINTIFF

Nance *v.* British Columbia Electric Railway Co., Ltd.

Viscount Simon, Lord Porter, Lord Morton of Henryton, Lord Reid and Lord Asquith of Bishopstone
20th June, 1951

Appeal and cross-appeal from the Court of Appeal of British Columbia.

The plaintiff and her husband were run down by a street-car driven by the defendants' servant, and the husband was killed. A jury awarded her $35,000 damages, negativing the defendants' allegation of contributory negligence. The defendants appealed, contending that the following passage in the summing up of the trial judge constituted a misdirection: "Before you can find that Nance was guilty of contributory negligence, you must find that he owed a duty to the defendants, and that he committed a breach of that duty, and was therefore negligent." The Court of Appeal allowed the defendants' appeal for different reasons: Sloan, C.J., thought that the damages should be reduced to $20,000, with a further reduction to $12,000 if contributory negligence were proved. Smith, J.A., would have awarded $12,000 though he did not find contributory negligence proved. O'Halloran, J., thought that there should be a new trial. Both parties appealed.

VISCOUNT SIMON, giving the judgment of the Board, said that the statement that, when negligence was alleged as the basis of an actionable wrong, a necessary ingredient in the conception was the existence of a duty owed by the defendants to the plaintiff to take due care, was, of course, indubitably correct. But when contributory negligence was set up as a defence, its existence did not depend on any duty owed by the injured party to the party sued, and all that was necessary for establishing such a defence was to satisfy the jury that the injured party did not in his own interest take reasonable care of himself, and so contributed, by that want of care, to his own injury. For when contributory negligence was set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved was that, where a man was part author of his own injury, he could not call on the other party to compensate him in full. That view of the matter had recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in *Davies* v. *Swan Motor Co. (Swansea), Ltd.* [1949] 2 K.B. 291, to which Sloan, C.J., had referred. That, however, was not to say that in all cases the plaintiff who was guilty of contributory negligence owed to the defendant no duty to act carefully. Indeed, it would appear to their lordships that in running-down accidents like the present such a duty existed. The proposition could be put even more broadly: generally speaking, when two parties were so moving in relation to one another as to involve risk of collision, each owed to the other a duty to move with due care; and that was true whether they were both in control of vehicles, or both on foot, or one was on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. When a man stepped into the roadway, he owed a duty to traffic which was approaching him with risk of collision to exercise due care, and if a sentence of Denning, L.J., in *Davies'* case, at p. 324, was to be interpreted in a contrary sense, their lordships could not agree with it. As a matter of pleading the plea that the deceased was guilty of contributory negligence was wide enough to cover the contention that he was careless of his own safety even though he did not owe a duty to the defendant company to be careful. The question remained whether the impugned passage in the summing up should be regarded as vitiating the conclusion of the jury. Their lordships had come to the conclusion, after weighing those various elements, that the error complained of did not mislead the jury and that the verdict that the company were solely to blame should stand. As for damages, the Board were satisfied that the jury could

not reasonably have arrived at a figure exceeding $22,500. As the parties preferred an estimate by the Board to an order for a new trial, the appeal would be allowed, judgment entered for $22,500, and the cross-appeal dismissed. Appeal allowed. Cross-appeal dismissed.

APPEARANCES: *David A Sturdy* (Canadian Bar) (*Gard, Lyell and Co.*); *J. W. de B. Farris*, K.C., and *A. B. Robertson*, K.C. (both Canadian Bar) (*Linklaters & Paines*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law]

ENEMY ALIENS: STATUS OF PERSON ESCAPED FROM ENEMY-OCCUPIED TERRITORY

Hangkam Kwingtong Woo *v.* Liu Lan Fong (alias Liu Ah Lan)

Lord Simonds, Lord Normand, Lord Oaksey, Lord Radcliffe and Rinfret, C.J., of Canada. 23rd July, 1951

Appeal from the Supreme Court of Hong Kong.

In 1942 the defendant, a solicitor, left Hong Kong, which was occupied by Japan, and went to live in Free China, then in alliance with His Majesty. He left a power of attorney with one Chan in Hong Kong authorising him to sell his real and personal property. Chan sold a piece of real property to the husband of the plaintiff, but the sale remained incomplete for want of registration. After the purchaser had died in 1946 the defendant claimed the right to repudiate the agreement, and the purchaser's widow instituted these proceedings for specific performance of it. The courts in Hong Kong decided in her favour, and the defendant now appealed to His Majesty.

LORD SIMONDS, giving the judgment of the Board, said that the plaintiff relied on *Tingley* v. *Müller* [1917] 2 Ch. 144, and contended that by the common law of England (there was no Hong Kong Ordinance governing the matter) a general power of attorney given by a British subject, residing within His Majesty's allegiance, to one who was or became an enemy of His Majesty was not abrogated or avoided by the outbreak of war, and secondly, that there was no principle of the common law of Hong Kong, which the courts of Hong Kong administered, which constrained them to treat the residents of Hong Kong when that territory was in enemy occupation as for all purposes divided by the line of war from former residents who had escaped to some part of His Majesty's Dominions, or to the territory of an ally. That latter plea would first be examined by their lordships, for in a certain event it would be unnecessary to express a final opinion on the former. The question was: assuming that the common law of England in regard to trading with the enemy prevailed in the colony, what was the common law of England in that matter if England was itself enemy-occupied territory? To ask that question was to plunge into the unknown. The researches of counsel were unable to bring to light any case law or institutional writings of real assistance, for the soil of England had not within the period of the development of the common law in this matter been occupied by the enemy. Nor, though the same problem must in recent times have arisen in occupied Europe, could it be said that such a universal rule had been evolved that it ought to be adopted as part of the municipal law of England or Hong Kong. Therefore the problem must be approached by examining the principle on which at common law trading with the enemy was held to be illegal and, indeed, criminal, and then asking whether on that principle the courts of England (if England were occupied territory) or of Hong Kong, as in the present case, were bound to hold that contractual relations were abrogated between its citizens who were temporarily divided by the line of war. Their lordships at that stage made no distinction between the relationship of partner to partner and of donor to donee of a power of attorney. It was to be observed that the common feature of every statement of the principle and its reason was that the person with whom intercourse was illegal was regarded as an enemy by the court which had to determine the illegality.

It seemed clear that, whatever consequences might follow outside the occupied territory if one of its inhabitants, who had left it, sought to maintain or to initiate relations with another who had stayed within it, yet the courts of that country could not regard either him who had left or him who had stayed behind as an enemy of the King or of the other. Thus, there was a wide divergence between the problems which faced the courts of a belligerent power and those of an occupied territory. No one would deny that it was in the interest of the King that, when British territory was occupied by the enemy, its able-bodied or skilled inhabitants should escape across the line of war and continue to render him service. If for such men that was their right, or, as some would say, their duty, did public policy demand that, doing it, they should leave their affairs unattended by any responsible agent lest it should be said that, placing them in the hands of a lawful attorney, they were guilty of illegality and crime? If it were so, it would be a powerful deterrent against them rendering the service to the King which they could usefully continue to render. Their lordships did not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the courts of Hong Kong the rigid rules of the common law which might have to be applied outside the colony in regard to a transaction taking place within it. The purpose of their observations was to show that the defendant's contentions involved a grave extension of the common law, and that that extension meant not merely the application of old principles to new circumstances or their adjustment to fresh needs but the rewriting of them in conditions in which their foundations were shaken. In those circumstances their lordships were of opinion that the judgment of the court of Hong Kong should be upheld.

It became unnecessary to determine whether a general power of attorney was an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee were divided by the line of war. For, even if it were, it was not to be regarded as abrogated in the extraordinary case now under appeal. But *Tingley* v. *Müller* [1917] 2 Ch. 144, on which the plaintiff strongly relied as authority for the proposition that such an instrument remained of full force and effect notwithstanding the division of war, was difficult to reconcile with later cases and had itself been the subject of criticism in the highest tribunal. Appeal dismissed.

APPEARANCES: *Sir Roland Burrows*, K.C., and *A. J. Belsham* (*Reid, Sharman & Co.*); *Sir Andrew Clark*, K.C., and *Harold Lightman* (*Sharpe, Pritchard & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HOUSE OF LORDS

INCOME TAX: PAYMENTS BY COTTON COMPANY

Asia Mill, Ltd. *v.* Ryan

Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Radcliffe. 28th June, 1951

Appeal from the Court of Appeal.

The appellant company bought raw cotton for the purpose of their business of cotton-spinning. In April, 1944, they paid the Cotton Controller £55,087, which was agreed to be an allowable deduction in computing profits for income tax purposes, but the question was whether it could for income tax purposes be treated as part of the cost of stock-in-trade in hand on 13th January, 1945, the end of the company's relevant accounting year. During the war cotton spinners had to buy their raw cotton from the Controller. In 1942 spinners were encouraged to purchase cotton to the full extent of their storage space irrespective of their orders in hand for yarn. In pursuance of the agreement between the spinners and the Controller the company had to pay the £55,087 because on 17th April, 1944, the price of raw cotton rose by 4½d. a lb. when the company's "cover position" was "long," i.e., when they had bought cotton to the extent of 2,937,993 lb. in excess of the weight of yarn which they had contracted to sell. The company would under the arrangement have received an appropriate payment from the Controller had their "cover position" been "short," i.e., if they had contracted to sell a weight of yarn in excess of raw cotton in store or under contract of purchase. The payments to be made had no relationship to the price the spinner actually paid for the cotton, the weight of which determined his "cover position" at the relevant date; nor was cotton bought from ordinary suppliers before the war to be excluded from the calculation. The Commissioners for the Special Purposes of the Income Tax Acts held that the cost to the company of the stock of cotton was the invoice price and that the £55,087 was not relevant to the value of stock-in-trade. Croom-Johnson, J., whose decision was affirmed by the Court of Appeal, held, allowing the Crown's appeal, that a proper proportion of the sum was part of the cost of the company's stock-in-trade, the value of which must be increased accordingly. The company now appealed to the House of Lords, which took time for consideration.

LORD PORTER said that the payment in question was not an increase in the cost of the cotton, but a global payment in respect

of the holding of cotton in excess of that required to fulfil the company's contracts. There was no reason for making the assumption that the payment was a condition on which future supplies were granted; but, even if it were true, it provided, indeed, a consideration for the payment, but did not furnish a reason for holding that the payment for a right to receive further supplies was to be regarded as increasing the cost of that already supplied. The appeal succeeded.

The other noble lords concurred in the allowing of the appeal. Appeal allowed.

APPEARANCES: *Heyworth Talbot*, K.C., and *Roy Borneman* (*Whitfield, Byrne & Dean*, for *J. Arnold Brierley & Robinson*, Oldham); *Sir Frank Soskice*, K.C. (A.-G.), and *R. P. Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

ARTICLES OF ASSOCIATION: CONSTRUCTION

Friends Provident and Century Life Office *v.* Investment Trust Corporation, Ltd.

Lord Simonds, Lord Goddard, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker. 26th July, 1951

Appeal from the Court of Appeal.

The articles of association of a company provided: "The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being . . . the amount remaining shall be the clear sum of 6 per cent. per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6s. in the £ computed on the gross sum of 6 per cent. per annum on such capital, such dividend to rank next after the dividend payable in respect of the said 250,000 cumulative preference shares and in priority to the dividend on the said 300,000 'C' cumulative preference shares and also on the ordinary shares for the time being of the company, but to no further right to participate in the profits of the company." From 1939, when the standard rate of income tax for the first time exceeded 6s. in the £, being raised to 9s., the company calculated the tax payable on dividends from the "B" shares by "grossing up" the dividends on the basis of tax at 6s. in the £ and calculating the extra 3s. tax on that "grossed up" value. Vaisey, J., opposed the above method of computation. There was no appeal against his decision. In *Austin Motor Co., Ltd.* v. *British Steamship Investment Trust, Ltd.* [1950] 1 All E.R. 632, the Court of Appeal, reversing Wynn Parry, J., held that the tax should be computed by a simple deduction at 3s. in the £ from the dividend on shares received in accordance with the article, a method more favourable to the holders of "B" shares. This appeal was then brought against Vaisey, J.'s decision by the holders of "B" shares and allowed by the Court of Appeal in accordance with the decision cited. The holders of shares ranking subject to the "B" shares now appealed. The House took time for consideration.

LORD SIMONDS said that the question was one of construction of this particular article, and as it was possible that even slight differences of language might lead to a different result, he did not propose to travel beyond it. It would be wrong to approach the construction with any preconceived notion that the draftsman aimed at achieving the result of a dividend tax-free up to a certain rate of standard income tax. The question was the meaning of the words in fact used. The vital words were "computed on the gross sum of 6 per cent. per annum on such capital" and it was on the word "gross" that the appellants relied, arguing that it was something different from "the sum" *simpliciter*, and was used in contrast with "the clear sum of 6 per cent. per annum," found earlier in the article. He (his lordship) could not accept the argument that the words meant "the gross sum corresponding at the rate of tax for the time being in force with a clear 6 per cent. per annum dividend on such capital" or some other formula indicating the result of a process in recent years dignified by the description "grossing up."

The other noble lords agreed that the appeal failed. Appeal dismissed.

APPEARANCES: *S. Pascoe Hayward*, K.C., *J. H. Stamp* and *K. B. Suenson-Taylor*; *Cyril King*, K.C., and *Ralph Instone*; *R. J. T. Gibson* (*Gouldens*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

LEGAL AID: TRANSFER TO COUNTY COURT

Burton and Another *v.* Holdsworth

Jenkins and Birkett, L.JJ. 22nd June, 1951

Appeal from Streatfeild, J. ([1951] W.N. 343).

A collision took place between the plaintiffs' motor cycle and the defendant's motor van, one of the plaintiffs sustaining injuries which might result in permanent partial disability, and the other plaintiff lesser injuries. Both plaintiffs were of the working class, earning £7 10s. and £6 respectively a week, and without capital. The defendant denied negligence and pleaded that the accident was caused solely by the negligence of one of the plaintiffs. On the defendant's application, the master refused to order that, unless the plaintiffs gave security for the defendant's costs, the action should be transferred to a county court under the County Courts Act, 1934, s. 46, for in his opinion, as one of the plaintiffs had received a legal-aid certificate under the Legal Aid and Advice Act, 1949, he was precluded from making an order under the section. Streatfeild, J., held, on the defendant's appeal, that the issue of a legal-aid certificate did not preclude the court from exercising its discretion under s. 46 of the Act of 1934, for the plaintiffs could not be said to have "visible means of paying" the defendant's costs of an action in the High Court if they should prove unsuccessful. The plaintiffs now appealed.

JENKINS, L.J., said that in a case in which an appellant had obtained a certificate as an assisted person for the purpose of prosecuting an appeal, an order putting him on terms which required him to give security or otherwise be shut out from prosecuting his appeal might well be regarded, in the absence of special circumstances, as inconsistent with the intention of the Act of 1949. The matter here in question was, however, entirely different. Section 46 of the Act of 1934 was admittedly not a provision which ordered security and in default dismissed or stayed the action; it was a provision under which the court, if in all the circumstances of the case it appeared right to do so, might make an order transferring the action to the county court. The plaintiff, if dissatisfied with that, was given the opportunity of preventing the transfer by providing for the stipulated security. Therefore, *Conway* v. *George Wimpey & Co., Ltd.* (No. 1) [1951] 1 T.L.R. 215, had no bearing on the present case. Authorities under the old Poor Persons Rules could not be regarded as authorities governing the situation under the Act of 1949, and regulations made under it. They were, however, of some assistance by way of analogy. His lordship discussed *Perry* v. *London General Omnibus Co.* [1916] 2 K.B. 335, and *Cook* v. *Imperial Tobacco Co.* [1922] 2 K.B. 158, and said that the present was an *a fortiori* case.

The plaintiffs' substantial argument turned on the reference in s. 46 to an affidavit "showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff." It was said that there the costs of the defendant must mean such costs as the plaintiff would become liable to pay in the event of the defendant's successfully defending the action. It followed that it could never be said of an assisted person that such a person had no visible means of paying the defendant's costs, because the Act of 1949 and the regulations ensured that the costs payable by the assisted person should be limited to such amount as in the judgment of the court was within the assisted person's means or capacity to pay. Thus, in effect, although s. 46 had not been repealed by the Act of 1949 or the regulations, as a matter of construction its provisions could not apply to an assisted person. Streatfeild, J., rightly rejected that argument. Section 46 was designed to protect defendants from being put to expenses which they could not recover from the opposite party in High Court actions brought against them in tort by impecunious plaintiffs. It was a valuable protection to defendants against whom such actions were brought. In view of s. 1 (7) of the Act of 1949 that right should not be held to be taken away unless by the Act itself or the regulations. The appeal failed.

BIRKETT L.J., agreed. Appeal dismissed.

APPEARANCES: *A. H. Glenn Craske* (*Stocken, May, Sykes and Dearman*); *Neil Lawson* (*A. E. Wyeth & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DISCOVERY OF DOCUMENTS: ALLEGED INJURY BY DEFENDANTS' PRODUCT

Board *v.* Thomas Hedley & Co., Ltd.

Denning, Birkett and Hodson, L.JJ. 27th June, 1951

Appeal from Devlin, J., in chambers.

The plaintiff alleged that she contracted dermatitis on the hands through using the defendants' product, and that they should have known that it was dangerous. They contended that the product was safe to all normal users, but that she was unusually susceptible to dermatitis. Discovery having been ordered, the defendants disclosed all complaints and congratulatory letters which they had received up to the date on which the plaintiff bought the carton containing the product. They did not disclose the complaints or congratulatory letters received after that date. The plaintiff applied that the defendants should disclose " all complaints and other documents " relating to the product received since the date of her purchase. The master refused the application, but, on appeal, Devlin, J., granted it. The defendants now appealed.

DENNING, L.J., said that if the sole issue had been the defendants' state of mind when they issued the carton, i.e., whether they then knew, or ought to have known, that the product was dangerous, it would have been immaterial to inquire what complaints they received after the date of purchase. There was, however, also the most important issue, whether the product was dangerous at all. It would be dangerous if it might affect normal users adversely, or even if it might so affect other users with a higher degree of sensitivity so long as they were not altogether exceptional. On that issue it would be admissible for the defendants to call evidence that they had sold large quantities of the product without receiving any complaints; or, if they had received a few complaints, to explain those by saying that they were cases in which the product had not been used properly, or in which the person concerned was unusually susceptible. It was common practice to call such evidence in such cases as the present. Conversely, it must be admissible for the plaintiff to call witnesses who could show that they were normal in their sensitivity, or, at any rate, not altogether exceptional, and that nevertheless they suffered from dermatitis through using the product; and those witnesses would not be confined to users before the date of purchase, but would extend also to users at a subsequent time. The plaintiff would, of course, if asked, have to give particulars of any person on whom she relied in this respect, so that the defendants could investigate the complaint; but the evidence would certainly be relevant and admissible. Once it was held that evidence of dermatitis suffered by subsequent users would be admissible because relevant to the issue whether the product was dangerous, it followed that the documents relating to complaints of subsequent users ought to be disclosed, for they might fairly lead to a train of inquiry enabling the plaintiff to advance her case. The relevant information with regard to complaints was all in the hands of the defendants; and justice required that the plaintiff also should be put in possession of it so that she could present her case on equal terms. If she were thereby enabled to find witnesses to support her case, well and good; for it was right and proper that the important issue whether the product was dangerous should be fully investigated. That it might lead to other complainants bringing legal proceedings which they might not otherwise have brought was not a sufficient reason for refusing the discovery. The order should, however, be confined to " all complaints of personal injuries and other documents with regard thereto." The appeal should be dismissed.

BIRKETT and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Gilbert Beyfus*, K.C., and *R. Ormrod* (*Routh, Stacey, Hancock & Willis*); *Montague Waters* (*Stanley Brent and Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

ESTATE AGENT: COMMISSION

Trinder & Partners *v.* Haggis

Evershed, M.R., Denning, L.J., and Roxburgh, J. 2nd July, 1951

Appeal from Croydon County Court.

After the defendant had orally instructed the plaintiff estate agents to find a purchaser for his house, they wrote to him: " In the event of us [*sic*] being successful in introducing a person willing to sign a contract to purchase at an agreed price, you will pay us the usual sale commission . . ." The defendant never acknowledged the letter, but he verbally instructed the agents to sell for £2,900 to a purchaser whom they had found. The purchaser signed a draft contract, but the defendant refused to sign, and the sale went off. The estate agents brought this action for their commission on the lost sale. Judge Sir Gerald Hurst, K.C., gave judgment in their favour, and the defendant now appealed.

EVERSHED, M.R., said that, in his opinion, the contract of agency was stated in the agents' letter, and the defendant had by his conduct—which could not in the circumstances be referable to any other terms of engagement—bound himself in the terms of that letter. There remained the question of its construction. If a commission was to be attracted at any stage before the coming into existence of a binding contract, it must be so provided in the contract of agency in clear terms (*Bennett, Walden and Co. v. Wood* [1950] W.N. 329). It was argued that the words " introducing a person willing to sign a contract to purchase at an agreed price " meant no more, and no less, than introducing a person who had signed an enforceable contract to purchase. That argument was over-subtle. As a matter of English, he thought, those words covered the events which happened in this case. The case was remarkable. It was hardly conceivable that any similar circumstances would again arise where the intending vendor allowed matters to proceed to the stage which they reached here without any intimation whether he had yet made up his mind whether he wished to sell. For practical purposes, therefore, the form of words used in the agents' letter would in ninety-nine cases out of a hundred produce a result no different from that which flowed from a contract to pay commission if the agents " find a purchaser." But this was, in his judgment, the hundredth case, and the appeal ought to be dismissed.

DENNING, L.J., dissenting, said that, in his opinion, the agents' letter was not clear enough to bind the defendant to pay commission in the events which had happened. Further, the defendant's failure to reply to the letter could not, by itself, make an agreement where none existed before. The agents had not suggested that an agreement had been made verbally at the interview preceding the letter, and so the defendant's silence could not have any confirmatory effect. Finally, the defendant could not be taken to have accepted the agents' letter as an offer, for his conduct, which must be unambiguous to constitute an acceptance, was neutral. He thought that the appeal should succeed.

ROXBURGH, J., agreed with Evershed, M.R. Appeal dismissed.

APPEARANCES: *J. R. B. Fox-Andrews* (*Wilkins, Rohan and Newman*); *J. Hamawi* (*Lewis & Lewis & Gisborne & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

BANK IN ENEMY-OCCUPIED COUNTRY: GOLD DEPOSITED IN LONDON

Bank voor Handel en Scheepvaart N.V. *v.* Slatford

Devlin, J. 30th July, 1951

Action.

The plaintiffs, a Dutch bank, before the war of 1939 to 1945 deposited a quantity of gold in a safe deposit in London. On 20th May, 1940, the Netherlands became enemy territory for the purposes of the Trading with the Enemy Act, 1939. The bank retained their commercial domicil in the Netherlands. The Royal Netherlands Government, exercising their sovereign powers from London, on 24th May, 1940, with the object of preventing property belonging to persons resident in occupied Netherlands from being used contrary to the interests of the Netherlands, issued a decree purporting to transfer such property to the state for as long as might be necessary. On 3rd July, 1940, the Board of Trade made a vesting order under s. 7 of the Act of 1939 transferring the gold to the Custodian of Enemy Property for England and Wales. On 22nd July a further order was made giving the Custodian power to sell the gold, and he did so for some £2,000,000. The bank now claimed against the Custodian in conversion the present value of the gold bars. (*Cur. adv. vult.*)

DEVLIN, J., reading his judgment, said that the substantial question was whether the decree was effective to transfer property situate in this country. The Custodian submitted that the English courts would not enforce it since they would treat it as having no extra-territorial effect. The bank's submission was that the

general rule was to the contrary, and that the legislation of a foreign state affecting the title of its nationals to movables in England would be applied by the English courts unless, first, the legislation were contrary to public policy—as, for example, confiscatory or penal legislation—or, secondly, its application would infringe English legislation. Alternatively, the bank submitted that if it were the general rule that foreign legislation was not enforceable, then the decree fell within an exceptional category. In *Lorentzen* v. *Lydden & Co., Ltd.* [1942] 2 K.B. 202, Atkinson, J., held that a similar Norwegian decree was effective. In *O/Y Wasa Steamship Co., Ltd.* v. *Newspaper Pulp and Wood Export, Ltd.* (1949), 82 Ll. L. Rep. 936, Morris, J., considered the decree now in question and followed that decision. In *Government of the Republic of Spain* v. *National Bank of Scotland, Ltd.* [1939] S.C. 413, the Court of Session refused to enforce a Spanish decree purporting to requisition a Spanish ship at Glasgow. He recognised the force of the point that if the principle were as wide as the Custodian said there would be no need for any case to have been decided on the basis that the foreign legislation was confiscatory. But the *dicta* in the English cases seemed to be sufficient to support the conclusion in the Scottish case, and he thought the rule there laid down was a sound one. If Atkinson, J., decided that the general rule was otherwise, he (Devlin, J.) respectfully preferred the decision in the Scottish case. With regard to the bank's alternative contention that the decree should be regarded as exceptional, the extent to which a particular decree served the end of British policy was entirely a matter of political decision. It would be unwise, in the light of the authorities on public policy, to propound as a new rule of public policy the principle for which the bank contended. If foreign legislation were as a general rule to be admitted, it would have to be excluded when politically harmful. The difficulty of formulating any satisfactory principle of exclusion was a formidable argument against the validity of the rule contended for by the bank. The action failed. Judgment for the defendant.

APPEARANCES: *Sir Walter Monckton*, K.C., *John Foster*, K.C., and *Mark Littman* (*Hardman, Phillips & Mann*); *Sir Lynn Ungoed-Thomas*, K.C. (S.-G.), *G. R. Upjohn*, K.C., *J. P. Ashworth* and *R. J. Parker* (*The Solicitor, Board of Trade*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CONTRIBUTORY NEGLIGENCE: NO CONTRIBUTION BY HUSBAND TO WIFE'S DAMAGES

Drinkwater and Another *v.* Kimber

Devlin, J. 31st July, 1951

Action.

The second plaintiff, while travelling as a passenger in a motor van driven by her husband, the first plaintiff, was injured as a result of a collision between the van and a motor car driven by the defendant. In the plaintiffs' action against the defendant for negligence, liability was admitted. The husband's claim was settled, but the defendant counter-claimed against him, contending that he, as joint tortfeasor and as partly responsible for the collision, should be made to contribute towards the damages which the defendant should be held liable to pay the wife. By s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935: "Where damage is suffered by any person as a result of a tort . . . (i) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . ." By s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage . . ." (*Cur. adv. vult.*)

DEVLIN, J., having assessed the wife's damages at £405 and apportioned the blame as to one-third against the husband and two-thirds against the defendant, said that it was admitted that the defendant could not avail himself of s. 6 (1) of the Act of 1935, because a wife could not sue a husband for negligence, and therefore the husband here was not a "tortfeasor who is, or would if sued have been, liable in respect of the same damage." The defendant relied on s. 1 (1) of the Act of 1945, contending that he was a person who had suffered damage as the result partly of his own fault and partly of the husband's fault, and that his claim in respect of that damage was not to be defeated by reason of his own fault. But that construction was not permissible; that Act was not intended to alter any substantive defence to a cause of action; it concerned causation rather than liability. If the defendant's contention were right there would be a clash between subss. (1) and (3) of s. 1. Therefore, the counter-claim failed. Judgment accordingly.

APPEARANCES: *Tristram Beresford*, K.C., and *F. G. Paterson* (*R. I. Lewis & Co.*); *P. M. O'Connor* (*Hewitt, Woollacott and Chown*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

DIVISIONAL COURT

UNDISCLOSED ADULTERY: NO "ERROR OF THE COURT"

Alhadeff *v.* Alhadeff

Lord Merriman, P., and Havers, J.
8th June, 1951

Application for rehearing of a petition for divorce.

After the wife had been granted a decree *nisi* on the ground of desertion it emerged that she had committed adultery after presentation of her petition. There had been no prayer for the exercise of the court's discretion in her favour. The husband therefore made this application under r. 36 of the Matrimonial Causes Rules for rehearing of the petition.

LORD MERRIMAN, P., having referred to a question of domicile arising in the case, said that both parties had, however, urged on the court that the substance of the case depended on the view it should take of interfering with the decree *nisi* and ordering a rehearing. The King's Proctor's suggestion that a proper course to take would be to apply for a rehearing was, on balance, an additional ground for ordering a rehearing. It had been contended for the wife that, on the assumption that this was a r. 36 case, the application might be dismissed, for the court would not automatically order a rehearing on account of some matter not known to the court below; and if the court were to think that the adultery could have had no effect on the decree if known at the material time, the court should not interfere by ordering a rehearing. Assuming that the whole case were not thrashed out by the Divisional Court, that argument was difficult to understand: it was impossible to say that the issue would have been the same as in the case of a wife putting herself forward with a clean record. There remained *Tucker* v. *Tucker* [1949] P. 105; 92 SOL. J. 676, with which he (his lordship) wholly agreed, and on which reliance had been placed on behalf of the wife. Hodson, J., had there expressed the view that, on the material before it, the court had no good reason to believe that the husband, who had obtained the decree *nisi*, had wrongly succeeded and that it was not in the public interest to order a rehearing. Here, on the other hand, there was good reason to believe that the wife had wrongly succeeded, and it was in the public interest that a rehearing should be ordered.

HAVERS, J. agreed. Application granted.

APPEARANCES: *Melford Stevenson*, K.C., and *Elwyn Jones* (*E. Gordon Lawrence*); *John Latey* (*Peacock & Goddard*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SALVAGE: ACTION BY ENEMY ALIEN

Bugsier Reederei-und-Bergungs A/G *v.* S.S. "Brighton" (Owners)

The "Brighton"

Willmer, J. 12th June, 1951

Preliminary point of law.

The plaintiffs, an enemy-alien company, rendered salvage services to the defendants' ship. They were granted by the Home Secretary a licence to sue the defendants in the High Court for salvage remuneration. The action having been launched, the defendants took the preliminary objection that the Royal Warrant of 1st April, 1944, under which the licence was issued, did not authorise the granting of the licence (*a*) because a Royal Warrant issued in 1944, when Germany was actively engaged in war with His Majesty, could not be taken as contemplating proceedings by persons so engaged; and (*b*) because the warrant was for the protection of the nationals of enemy-occupied countries who became technically alien enemies.

WILLMER, J., said that the objection was ill-founded and without merits. It was not competent for that court to inquire

into the validity of a licence signed by one of His Majesty's Secretaries of State in pursuance of a Royal Warrant, or to inquire into the circumstances in which it was issued; for the issue of such a licence was an executive or political act, entirely within the discretion of His Majesty's Secretary of State (see McNair on the Legal Effects of War (3rd ed.), p. 189, and *Usparicha* v. *Noble* (1811), 13 East 332, *per* Lord Ellenborough, at p. 341). He (his lordship) therefore did not think that it was competent for him to do otherwise than accept the licence as legal. It was a matter entirely for the discretion of the Secretary of State in his executive capacity whether in a particular case a licence ought to be issued or withheld. As a matter of law, it appeared to him that, even if it were proper for him to question the validity of such a licence, it would be quite improper for him to inquire whether the particular licence in question was properly or rightly issued. The objection failed and the action would proceed. Preliminary objection overruled.

APPEARANCES: *J. V. Naisby*, K.C., and *Vere Hunt* (*Constant and Constant*); *R. F. Hayward*, K.C., and *G. N. W. Boyes* (*Middleton, Lewis & Co.*, for *Middleton & Co.*, Sunderland).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

DESERTION: NON-COHABITATION CLAUSE

Bottoms *v.* Bottoms

Lord Merriman, P., and Havers, J. 14th June, 1951

Appeal from Epping justices.

In 1922 the justices made a maintenance order, which contained a non-cohabitation clause, on the ground that the husband had deserted his wife. In 1951 the husband applied for variation of the order of 1922 by striking out the non-cohabitation clause and discharging the maintenance clause. He gave evidence when making his application, of overtures for a reconciliation, the last in a letter written by him in 1950. The application was dismissed and the husband now appealed. It appeared from the husband's evidence that, if the non-cohabitation clause were deleted, the letter of 1950 might be used by him in proceedings by him for divorce for desertion.

LORD MERRIMAN, P., said that the justices had never really decided the true point. In a case such as the present, where a separation order had been in force for nearly thirty years, and the wrongdoer was trying to get rid of it, the wrongdoer must show some substantive ground for doing so. By coupling it with the attempt to get rid of the money payment at the same time, the husband had misled himself and the justices into dealing with the case as if it were a simple one where the wife had an order for desertion and the husband was trying to end the desertion by offering to resume cohabitation. Overtures had been made by the husband, but the justices had dismissed the whole summons solely on the ground that there was not a *bona fide* offer. So long as the non-cohabitation clause subsisted, the question of making offers of a resumption of cohabitation was beside the point. The clause had the effect by law of a judicial separation on the ground of cruelty. So long as it stood, the wife had a complete answer to any overtures for reconciliation, and the question whether the offers were *bona fide* did not arise. The first factor to be considered was what were the grounds on which the non-cohabitation clause had been inserted in the order; what had the wife been found to have suffered which necessitated it? For justices were empowered to vary an order, and, therefore, clearly empowered to vary it by striking out a non-cohabitation clause only upon fresh evidence which must satisfy the court that it was proper to make the alteration. The case must be sent back to the justices, who must have very plainly in mind that it was the wrongdoer who was trying to set aside the order which was originally made for the protection of the aggrieved party, and not the aggrieved party herself. When it was the wrongdoer who was seeking to set a non-cohabitation clause aside, he must show good cause for doing so. In other words, he must produce fresh evidence, as those words were understood in *Timmins* v. *Timmins* [1919] P. 75.

HAVERS, J., agreed.

Appeal allowed. Case remitted.

APPEARANCES: *John Mortimer* (*Alfred Powell*, for *Hensman, Jackson & Chamberlain*, Northampton); *M. Ahern* (*Breeze & Wyles*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

EXECUTORS: REVOCATION OF PROBATE OWING TO INFIRMITY

In the estate of Galbraith, deceased

Karminski, J. 11th July, 1951

Probate motion.

The will and codicils of the deceased were proved by the two executors named in the will in June, 1945. Part of the estate undistributed consisted of shares in Argentine companies, a matter requiring constant attention. Both the executors, very old men, were proved by medical evidence to be infirm and incapable of attending to their duties under the will, and solicitors gave evidence of inability to obtain instructions from them. The court was moved to revoke the probate of the will and codicils granted to the executors and to grant letters of administration *de bonis non* in the estate of the deceased with the will and codicils annexed to the applicant. All parties concerned consented to the motion.

KARMINSKI, J., said that the application was novel to the extent that there appeared to be no reported case in which both executors had been relieved of their duties in such circumstances. It was clear that both executors were suffering from infirmities which made it impossible for them to carry out their duties. The court must look after the interest of the estate and the beneficiaries. Applying the principle enunciated in *In the Goods of Loveday* [1900] P. 154, at p. 156, he would make the order in the terms of the motion. Application granted.

APPEARANCES: *Miss Morgan Gibbon* (*Birkbeck, Julius, Edwards & Coburn*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

EVIDENCE TO DISCREDIT OPPOSING WITNESS: EXTENT OF ADMISSIBILITY

R. *v.* Gunewardene

Lord Goddard, C.J., Lynskey and Devlin, JJ. 13th June, 1951

Appeal from conviction.

The appellant, a medical practitioner, was convicted of manslaughter with a woman who had performed an operation to procure abortion. The subject died, and the appellant was indicted as an accessory before the fact. At the trial of the appellant the prosecution put in a statement in which the woman admitted performing the operation and incriminated the appellant. The appellant's defence was one of alibi as well as of belief that he was attending a normal case of miscarriage. The prosecution called as witness one Davies who gave evidence extremely damaging to the appellant. The appellant later called a doctor to give evidence as to the condition of Davies' mind. Counsel for the prosecution objected. Counsel for the defence stated that the doctor was to prove that Davies was suffering from a particular mental state, and the effect of that state, so that whether Davies' evidence was to be rejected would be a matter of inference for the jury. The trial judge held the evidence inadmissible. The appellant was convicted, and now appealed on the grounds (*a*) that that evidence should have been admitted, and (*b*) that the co-prisoner's statement incriminating the appellant ought not to have been read. (*Cur. adv. vult.*)

LORD GODDARD, C.J., reading the judgment of the court, referred to *R.* v. *Rowton* (1865), 34 L.J.M.C. 57; *R.* v. *Brown* (1867), L.R. 1 C.C. 70; *R.* v. *de la Motte* (1781), 21 St. Tr. 687; *Mawson* v. *Hartsink* (1802), 4 Esp. 102; *Carlos* v. *Brook* (1804), 10 Ves. 49; and *R.* v. *Watson* (1817), 2 Stark. 116, and said that the credit of a witness might be impeached by means of the evidence of persons who swore that they, from their knowledge of the witness, believed him to be unworthy of credit on his oath. That principle, however, did not permit the calling by one side of a doctor to discredit the evidence of a witness for the other side by testifying that he was suffering from a disease of the mind so that his testimony was unreliable; the doctor could state his individual opinion, but not the facts on which it was based. As for the second ground of appeal, while, when there was a joint trial, the judge must impress on the jury that the statement of one prisoner not made on oath in the course of the trial was not evidence against the other, it could not be laid down as a rule that, when the prosecution were putting in such a statement, they must select certain passages from it, and omit others. Appeal dismissed.

APPEARANCES: *D. N. Pritt*, K.C., *J. D. Gunewardena* and *Eric Myers* (*Darracotts*); *Christmas Humphreys* (*D.P.P.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Bacon (Rationing) (Amendment No. 3) Order, 1951. (S.I. 1951 No. 1477.)
Bolts, Nuts, etc., Prices (No. 2) Order, 1951. (S.I. 1951 No. 1422.)
Caithness County Council (Loch Calder) Water Order, 1951. (S.I. 1951 No. 1466 (S.77).)
Civil Defence (Shelter) (Planning) Regulations, 1951. (S.I. 1951 No. 1450.)
Civil Defence (Shelters) (Scotland) Regulations, 1951. (S.I. 1951 No. 1459 (S.74).)
Consular Conventions (Kingdom of Norway) Order in Council, 1951. (S.I. 1951 No. 1165.)
County of Lancaster (Electoral Divisions) Order, 1951. (S.I. 1951 No. 1468.)
Draft **Double Taxation Relief** (Taxes on Income) (Kenya) Order, 1951.
Draft Double Taxation Relief (Taxes on Income) (Tanganyika) Order, 1951.
Draft Double Taxation Relief (Taxes on Income) (Uganda) Order, 1951.
Draft Double Taxation Relief (Taxes on Income) (Zanzibar) Order, 1951.
Export of Goods (Control) Order 1951 (Amendment No. 3) Order, 1951. (S.I. 1951 No. 1476.)
Fire Services (Conditions of Service) (Scotland) (Amendment) (No. 2) Regulations, 1951. (S.I. 1951 No. 1473 (S.78).)
Food Standards (Fish Paste) Order, 1951. (S.I. 1951 No. 1456.)
Food Standards (Meat Paste) Order, 1951. (S.I. 1951 No. 1457.)
Gas (Conversion Date) (No. 31) Order, 1951. (S.I. 1951 No. 1461.)
Hampton Court Park Regulations, 1951. (S.I. 1951 No. 1454.)
Import Duties (Drawback) (No. 20) Order, 1951. (S.I. 1951 No. 1434.)
Import Duties (Drawback) (No. 21) Order, 1951. (S.I. 1951 No. 1435.)
Infestation (Amendment) Order, 1951. (S.I. 1951 No. 1487.)
Iron and Steel Prices (No. 2) Order, 1951. (S.I. 1951 No. 1423.)
Linoleum and Printed Felt Base (Maximum Prices and Charges) (Amendment No. 3) Order, 1951. (S.I. 1951 No. 1472.)
London Traffic (Prescribed Routes) (No. 19) Regulations, 1951. (S.I. 1951 No. 1462.)
London Traffic (Prescribed Routes) (No. 20) Regulations, 1951. (S.I. 1951 No. 1474.)
Methylated Spirits (Amendment) Regulations, 1951. (S.I. 1951 No. 1470.)
National Health Service (Local Health Authority Charges) (Scotland) Amendment Regulations, 1951. (S.I. 1951 No. 1464 (S.75).)
National Health Service (Remuneration and Conditions of Service) (Scotland) Regulations, 1951. (S.I. 1951 No. 1465 (S.76).)
Paper Bag Wages Council (Great Britain) Wages Regulation Order, 1951. (S.I. 1951 No. 1429.)
Paper Box Wages Council (Great Britain) Wages Regulation Order, 1951. (S.I. 1951 No. 1430.)
Police Regulations, 1951. (S.I. 1951 No. 1424.)
Police (Women) Regulations, 1951. (S.I. 1951 No. 1425.)
Retention of Pipe Under Highway (Cambridgeshire) (No. 4) Order, 1951. (S.I. 1951 No. 1447.)
Road and Rail Traffic Act, 1933 (Transfer of Jurisdiction of Appeal Tribunal) (Appointed Day) Order, 1951. (S.I. 1951 No. 1467.)
Sampling of Food (Revocation) Order, 1951. (S.I. 1951 No. 1458.)
Stopping Up of Highways (Dorset) (No. 2) Order, 1951. (S.I. 1951 No. 1448.)
Stopping Up of Highways (Essex) (No. 4) Order, 1951. (S.I. 1951 No. 1437.)
Stopping Up of Highways (Hampshire) (No. 4) Order, 1951. (S.I. 1951 No. 1439.)
Stopping Up of Highways (Hampshire) (No. 5) Order, 1951. (S.I. 1951 No. 1440.)
Stopping Up of Highways (Hampshire) (No. 6) Order, 1951. (S.I. 1951 No. 1441.)
Stopping Up of Highways (Kent) (No. 5) Order, 1951. (S.I. 1951 No. 1442.)
Stopping Up of Highways (Lancashire) (No. 3) Order, 1951. (S.I. 1951 No. 1446.)
Stopping Up of Highways (London) (No. 17) Order, 1951. (S.I. 1951 No. 1484.)
Stopping Up of Highways (Middlesex) (No. 5) Order, 1951. (S.I. 1951 No. 1443.)
Stopping Up of Highways (Middlesex) (No. 6) Order, 1951. (S.I. 1951 No. 1479.)
Stopping Up of Highways (Middlesex) (No. 7) Order, 1951. (S.I. 1951 No. 1480.)
Stopping Up of Highways (Norfolk) (No. 2) Order, 1951. (S.I. 1951 No. 1444.)
Stopping Up of Highways (Somerset) (No. 3) Order, 1951. (S.I. 1951 No. 1449.)
Stopping Up of Highways (South Shields) (No. 3) Order, 1951. (S.I. 1951 No. 1481.)
Stopping Up of Highways (Warwickshire) (No. 6) Order, 1951. (S.I. 1951 No. 1445.)
Stopping Up of Highways (West Riding of Yorkshire) (No. 7) Order, 1951. (S.I. 1951 No. 1438.)
Widnes Water Order, 1951. (S.I. 1951 No. 1542.)
Wild Birds Protection (Duddon Sands Area, Cumberland) Order, 1951. (S.I. 1951 No. 1460.)
York Water Order, 1951. (S.I. 1951 No. 1486.)

BOOKS RECEIVED

Conveyancers' Year Book 1950. (Volume 11.) By JAMES A. GIBSON, of Lincoln's Inn, Barrister-at-Law. Assisted by C. N. BEATTIE and J. P. WIDGERY, of Lincoln's Inn, Barristers-at-Law. 1951. pp. xl and (with Index) 170. London: The Solicitors' Law Stationery Society, Ltd. 30s. net.

Rent Control—Supplement. By DENNIS LLOYD, M.A., LL.B., of the Inner Temple, Barrister-at-Law, and JOHN MONTGOMERIE, B.A., of Lincoln's Inn, Barrister-at-Law. 1951. pp. xvi and 60. London: Butterworth & Co. (Publishers), Ltd. 9s. 6d. net.

Local Authorities' Powers of Purchase—A Summary. By A. S. WISDOM, Solicitor. 1951. Chichester: The Justice of the Peace, Ltd. 4s. net.

The Leasehold Property (Temporary Provisions) Act, 1951. Annotated by H. HEATHCOTE-WILLIAMS, K.C., Legal Member of the Town Planning Institute. 1951. pp. xiv and (with Index) 132. Hadleigh: The Thames Bank Publishing Co., Ltd. 10s. net.

The Conflict of Laws. Volume 3. By ERNST RABEL. 1951. pp. xlvi and (with Index) 64. Michigan University Press (London: Geoffrey Cumberlege). £5 net.

Mechanizing the Legal Office. By J. H. BURTON, F.S.A.A., F.C.C.S., F.I.M.T.A. 1951. pp. 39. London: Gee & Co. (Publishers), Ltd. 6s. net.

Wigram's Justices' Note-Book. Fifteenth Edition. By EDWARD HOOTON, M.A., LL.B. (Cantab.), Solicitor, Clerk to the Justices for the Borough of Mansfield and the Mansfield Division of the County of Nottinghamshire. 1951. pp. xxxiii and (with Index) 428. London: Stevens & Sons, Ltd. 37s. 6d. net.

OBITUARY

MR. E. W. S. PORTNELL

Mr. Edward William Salathiel Portnell, solicitor, of Hexham, died recently, aged 76. He was admitted in 1901.

MR. W. T. MORLAND

Mr. William Thornhill Morland, solicitor, of Abingdon, has died at the age of 76. He was admitted in 1900.

NOTES AND NEWS

Honours and Appointments

Mr. J. T. BROCKBANK, assistant solicitor in the Town Clerk's department, Wolverhampton, has been appointed senior assistant solicitor to Hertfordshire County Council.

Councillor N. A. FOSTER, solicitor, of Harrogate and Bradford, was installed as Mayor of Harrogate on 13th August in succession to Councillor J. Stanley Holmes, who has resigned owing to ill-health.

The following appointments are announced in the Colonial Legal Service: Mr. E. P. S. BELL, Puisne Judge, Tanganyika, to be Chief Justice, British Guiana; Mr. A. G. FORBES, Solicitor-General, Northern Rhodesia, to be Secretary for Justice and Solicitor-General, Gold Coast; Mr. H. S. PALMER, Resident Magistrate, Northern Rhodesia, to be Puisne Judge, Nigeria; Mr. F. J. PEARSON to be Assistant Lands Officer, Nyasaland; and Mr. B. A. G. TARGET to be Crown Counsel, Tanganyika.

Personal Notes

Mr. Alan Dawes, solicitor, of Peterborough, was married on 9th August to Miss Joan Pindar, of Steeton.

Mr. J. K. N. Stansbury, assistant solicitor to the Luton Borough Council, was married on 3rd August to Miss Sheila Doreen Cross, of March.

Miscellaneous

KESTEVEN DEVELOPMENT PLAN

The above development plan was on 31st July, 1951, submitted to the Minister of Local Government and Planning for approval. It relates to land situate within the County of Lincoln, parts of Kesteven, and comprises land within the North, South, East and West Kesteven Rural Districts and the Urban District of Sleaford. Certified copies of the plan as submitted for approval have been deposited for public inspection at the offices of the County Planning Officer, County Offices, Sleaford, and the Sleaford U.D.C., 19, Jermyn Street, Sleaford. Certified copies of the plan (other than the part relating to the Sleaford Town map area) have also been deposited for public inspection at the offices of the following local authorities:—

Grantham Borough Council, Guildhall, Grantham.
Stamford Borough Council, Town Hall, Stamford.
Bourne U.D.C., North Street, Bourne.
North Kesteven R.D.C., 31, Clasketgate, Lincoln.
South Kesteven R.D.C., 41, North Street, Bourne.
East Kesteven R.D.C., 18, Northgate, Sleaford.
West Kesteven R.D.C., 19, Watergate, Grantham.

Any objection or representation with reference to the plan may be sent in writing to the Secretary, Ministry of Local Government and Planning, 23, Savile Row, London, W.1, before 16th November, 1951, and should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the Lincoln County Council and will then be entitled to receive notice of the eventual approval of the development plan.

An order was made on 13th August setting up a Joint Board for the Lake District National Park. The Board will take over all responsibilities as local planning authority for the area as soon as it is in a position to do so. The date will be announced. Meanwhile any application for planning permission and any other correspondence intended for the local planning authority should, until further notice, be addressed to the authorities who have been dealing with similar communications before the order was made. A similar order will shortly be made for the Peak Park.

THE SOLICITORS ACTS, 1932 TO 1941

DONALD ERIC GREENFIELD, of West Flat, Kowloon Magistracy, Kowloon, Hong Kong, and c/o Supreme Court, Hong Kong, solicitor, having, in accordance with the provisions of the Solicitors Acts, 1932 to 1941, made application to the Disciplinary Committee constituted under the Act that his name might be removed from the Roll of Solicitors at his own instance on the ground that he wishes to join the Honourable Society of Gray's Inn as a student with the intention of qualifying for call to the Bar, an order was, on the 15th August, 1951, made by the Committee that the application of the said Donald Eric Greenfield be acceded to and that his name be removed accordingly from the Roll of Solicitors of the Supreme Court.

On the 15th August, 1951, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that there be imposed upon GEORGE HOLMES MOSSOP, of 61 Lord Street, Liverpool, a penalty of £50, to be forfeit to His Majesty, and that he do pay to the complainant his costs of and incidental to the application and inquiry.

On the 15th August, 1951, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that the name of JOSEPH EDMUND MORRIS, formerly of 199 Piccadilly, London, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

An order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that JOHN JOSEPH WARING, of 206 Stanley Road, Bootle, Liverpool, be suspended from practice as a solicitor for a period of two years from the 15th August, 1951, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

Wills and Bequests

Mr. H. T. F. King, retired solicitor, of Stourbridge, left £23,928 (£23,733 net).

Mr. C. A. Loxton, solicitor, of Cannock, left £38,621 (£38,245 net).

Mr. W. E. Singleton, retired solicitor, formerly of Essex Street, London, W.C.2, left £24,523.

Corrections

In our report of *Boguslawski* v. *Gdynia-Amerika Linie* (*No. 2*) at p. 500, *ante*, the appearances should have read: *Niall MacDermot* (*Hilder, Thompson & Dunn*); *J. Scott Henderson*, K.C., and *Robin Dunn* (*Constant & Constant*).

In *Vitkovice Horni a Hutni Tezirstvo* v. *Korner*, reported at p. 527, *ante*, Mr. Ian Warren was briefed for the appellants in addition to the other counsel mentioned.

PRINCIPAL ARTICLES APPEARING IN VOL. 95

7th July to 25th August, 1951

For articles up to and including 30th June, see Interim Index

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